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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

SOUTHWEST MARINE, INC.,
Petitioner,
vs.
BYRON GIZONI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?

LIST OF PARTIES

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BRIEF FOR THE PETITIONER

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit[1] reversed and remanded the decision of the United States District Court for the Southern District of California. The District Court had granted the motion of Southwest Marine, Inc. for summary judgment on the ground that Byron Gizoni ("Gizoni") was a ship repairman covered by the Longshore Act[2] rather than a Jones Act seaman.[3]

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[1]909 F.2d 385 (9th Cir. 1990).

[2]Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, hereinafter "Longshore Act" or "LHWCA".

[3]The Jones Act, 46 U.S.C. § 688(a).

JURISDICTION

Jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1).

STATUTES PRESENTED FOR REVIEW

The Jones Act, 46 U.S.C. § 688(a).

Sections 902(3), 902(3)(G), 902(4), 903(a), 905(a), and 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

STATEMENT OF THE CASE

Southwest Marine, Inc. ("Southwest Marine") operates a ship repair facility in San Diego, California, where it provides ship repair services to ocean-going vessels owned by the U.S. Government and commercial customers. That repair work frequently requires the use of floating platforms to position tools, equipment and supplies alongside the vessels under repair. The platforms are used to hold anchors, anchor chains, rudders, propellers and shafts removed from or installed on vessels in the shipyard.[4]

Some floating platforms are also used to provide additional work space for shipyard employees. However, none of the floating platforms have their own means of propulsion or steering, raked bows, navigation lights, or crew facilities of any type. Virtually every Southwest Marine maritime employee has walked across or worked on a floating platform during his employment.[5]

Gizoni worked as a rigger and rigger foreman under the direct supervision of the superintendent of the rigging department during his employment with Southwest Marine. His duties as a rigger

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[4]Joint Appendix ("J.A.") II.

[5]J.A. II, III.

foreman required him to supervise and participate in the loading of equipment, materials, supplies, and vessel components onto and off of vessels repaired at the shipyard. He was never assigned to any vessel. He never worked aboard vessels except to perform duties relating to the repair work performed by Southwest Marine for the vessel owner.[6]

Prior to April 6, 1987, a floating platform was secured to the apron of Southwest Marine's floating drydock, and to the rear of a Navy vessel in the shipyard for repair. The platform had been placed in that position for repair work on the rudder. Gizoni alleges that shortly after reporting for work on April 6, 1987, he was injured when his foot went through a hole in the platform.[7]

Gizoni received LHWCA benefits from Southwest Marine and subsequently filed a formal claim for benefits under the LHWCA. However, not satisfied with LHWCA benefits, Gizoni also filed a Jones Act suit against Southwest Marine on September 30, 1987, alleging, among other things, that he was a "seaman" injured as a result of his employer's negligence.[8]

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[6]J.A. II, III.

[7]J.A. II, III.

[8]Gizoni's suit, which included counts for maintenance and cure, and unseaworthiness, was filed September 30, 1987. The complaint is a standard seaman personal injury complaint in that it contains three standard seaman causes of action. The first cause of action is for negligence pursuant to the Jones Act, 46 U.S.C. § 688(a). The second cause of action alleges unseaworthiness. The third cause of action, although captioned "FOR MAINTENANCE AND CURE," alleges Gizoni sustained a disabling condition, great physical and mental pain, and that he would continue to incur medical and related expenses. All counts were dismissed when the District Court found that Gizoni was not a seaman as a matter of law and granted summary judgment to Southwest Marine. J.A. IV.

Southwest Marine filed its *Answer to Complaint* on February 4, 1988, alleging, *inter alia*, that Gizoni was not a Jones Act "seaman" and that his Jones Act and other claims were barred by the exclusive remedy provisions of the LHWCA.[9] On June 7, 1988, Southwest Marine filed its *Notice of Motion and Motion for Summary Judgment*, asserting the above defenses, and filed declarations which described Gizoni's job duties in detail. Oral argument was heard before the District Court on July 5, 1988 and the District Court filed its Order Granting Motion for Summary Judgment on September 16, 1988.[10]

On September 16, 1988, Gizoni filed a Notice of Appeal of the District Court judgment to the United States Court of Appeal for the Ninth Circuit. Gizoni submitted his brief to the court on or about February 28, 1989. Southwest Marine and *amicus curiae*, consisting largely of maritime employers, filed their briefs with the court on May 22, 1989. The parties argued before the Ninth Circuit on March 9, 1990. On July 24, 1990, the Ninth Circuit filed its decision reversing the judgment of the District Court. The Ninth Circuit held that Gizoni was entitled to proceed to a jury trial on his Jones Act and other seaman claims.[11]

SUMMARY OF ARGUMENT

The Ninth Circuit decision that a ship repairman who works on floats and platforms to repair various vessels in a shipyard is

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[9]J.A. V. The test for seaman status for unseaworthiness and maintenance and cure is identical to that for Jones Act seaman status. *Hall v. Diamond Marine Co.*, 732 F.2d 1246, 1248-9 (5th Cir. 1984); *Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380, 1382-2 (9th Cir. 1981). Therefore, the suit is hereinafter referred to as a Jones Act suit rather than a seaman personal injury suit.

[10]J.A. III.

[11]J.A. II.

entitled to proceed to a jury trial on a Jones Act seaman claim conflicts with the congressional intent behind the LHWCA and its amendments. Moreover, it imposes an unreasonable economic burden on LHWCA employers and creates a burden on employees, employers and the courts due to the duplicity of litigation and the multiple risks resulting from uncertainty as to coverage.

The Ninth Circuit decision also creates an unnecessary economic burden on LHWCA employers by requiring that they maintain both Jones Act and LHWCA insurance coverage for the same employees. Those financial and administrative burdens are imposed on an industry already threatened by financial problems associated with foreign competition, defense cutbacks, and high costs for LHWCA insurance. Land-based maritime employees, on the other hand, are beset with uncertainty as to the existence and source of a remedy for injuries despite their employment on a covered situs.

The situation described above conflicts with the congressional intent behind the LHWCA and its amendments to provide a uniform, no-fault compensation system to land-based maritime employees on the waterfront without the expense, uncertainty, and delay that tort actions entail. Moreover, the Ninth Circuit decision conflicts with the congressional intent behind the 1972 and 1984 LHWCA Amendments to immunize shipyards from multiple liabilities.

Restricting LHWCA coverage by permitting a Jones Act jury to expand an exemption to that coverage is inconsistent with congressional intent. The Court's decisions confirm that the purposes of the LHWCA were for expansive coverage and to supplant the Jones Act as a remedy for injuries to land-based maritime employees on a covered situs.

Employees in occupations covered by the LHWCA are land-based maritime employees as a matter of law and, therefore, are precluded from pursuing Jones Act claims against their statutory LHWCA employers. Indeed, employees in occupations covered

by the LHWCA are barred from pursuing Jones Act claims in the same way that such employees are barred from pursuing FELA claims and LHWCA Section 5(b) claims against their LHWCA statutory employers and unseaworthiness claims against third persons.

Where an employee is injured on a covered situs and is in an occupation covered by the LHWCA (or indisputably spends part of his time in such activities), that employee is barred from pursuing a Jones Act claim to a jury to determine seaman status. Summary judgment must be granted to the LHWCA statutory employer. However, where that employee's status cannot be determined by the court as a matter of law, Congress intended that the court defer to the LHWCA administrative agency charged by Congress with the authority and expertise to render LHWCA decisions, which includes addressing the threshold questions of LHWCA and Jones Act coverage.

However, as the District Court properly held, Gizoni is simply not a Jones Act seaman as a matter of law. Rather, he is a land-based maritime employee specifically covered by the LHWCA. His exclusive remedy is provided by the LHWCA. The Ninth Circuit has gone beyond the limits prescribed by Congress in allowing land-based maritime employees on a covered situs in occupations specifically covered by the LHWCA to pursue Jones Act claims against their statutory employers. Therefore, the Ninth Circuit decision that Gizoni is entitled to a jury trial on seaman status should be reversed.

ARGUMENT

I

THE APPROACH OF THE NINTH CIRCUIT RESURRECTS THE MISCHIEF CONGRESS INTENDED TO CORRECT WITH THE LHWCA AND ITS AMENDMENTS.

"Statutory language must be read in the light of the mischief to be corrected and the end to be attained."[12] Thus, coverage of the LHWCA and its amendments, and conversely the reach of the Jones Act, must be determined in light of the mischief to be corrected.

The Ninth Circuit held that Gizoni, a land-based ship repairman injured on a covered situs, is entitled to a jury trial on his Jones Act seaman status claim. However, the Ninth Circuit simply failed to consider the congressional intent behind the LHWCA and its amendments. The decision of the Ninth Circuit thus resurrects the mischief which Congress intended to correct with the LHWCA and its amendments.

Congress was concerned even prior to the 1972 LHWCA Amendments that the then existing "jurisdictional dilemma" regarding the LHWCA "press[ed] as sharply on employers as employees."[13] In *Davis v. Department of Labor and Industries*,[14] the Court emphasized that the "employer's contribution to a state insurance fund may . . . wholly fail to protect him against the liabilities for which it was specifically

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[12]*McDermott International, Inc. v. Wilander*, ___ U.S. ___, 111 S.Ct. 807, 814 (1991).

[13]*Davis v. Department of Labor and Industries*, 317 U.S. 249, 255 (1942).

[14]*Id.*

planned." The Court thus recognized that depending on the Court's determination in that case the employer might "not only lose the benefit of the state insurance to which [the employer] ha[d] been compelled to contribute . . . ; [the employer] might also . . . become liable for substantial additional payments."[15]

A similar result ensues from the Ninth Circuit decision. A statutory LHWCA employer must now bear the high cost of Jones Act and LHWCA insurance as well as the cost of administering and defending inconsistent LHWCA and Jones Act claims arising out of the same incident. The Ninth Circuit decision thus imposes an unreasonable economic burden on an industry already troubled by financial problems associated with foreign competition, overregulation, defense cutbacks, and high insurance costs.[16]

These additional economic and administrative burdens conflict with the congressional intent behind the 1972 and 1984 Amendments to the LHWCA to immunize shipyards and other statutory employers from multiple liabilities for injuries to their LHWCA employees.[17] The approach of the Ninth Circuit again exposes shipyards and other statutory LHWCA employers to multiple liabilities, in addition to the generous LHWCA benefits.

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[15]*Id.*

[16]*Cf. Oversight Hearings on the LHWCA, Part 1: Hearing Before the Subcomm. on Compensation, Health and Safety, House Education and Labor Comm.*, 95th Cong. 1st Sess. (1978), and *Hearings on S.1182 Before The Subcommittee on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. (1981) (Statements of Edwin Hood, President of the Shipbuilders Council, and Stewart Niles, Special Counsel, Shipbuilding Council).

[17]*See Bush v. Eagle-Picher*, 927 F.2d 445 (9th Cir. 1991); and S.Rep. No. 1125, 92nd Cong., 2d Sess., 9-10 (1972); H.R. Rep. No. 1441, 92nd Cong., 2d Sess., 6 (1972) (regarding the 1972 LHWCA Amendments).

"In enacting the LHWCA, Congress intended that it be the sole and exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award."[18] The Ninth Circuit decision makes the LHWCA a "stepping stone" to a possible jury award.[19]

Moreover, Congress enacted the LHWCA and its amendments in part to ensure that a uniform compensation remedy existed for injuries of land-based maritime employees on the waterfront.[20]

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[18]*Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132 (5th Cir. 1991).

[19]The congressional intent that the LHWCA be the employee's exclusive remedy is confirmed by the Senate Report on the 1984 Amendments:

> In amending the act today, we are strengthening further the language in section 905(b) to provide statutory immunity to shipyards against such negligence actions. We believe this achieves the goal of the conferees of making workers' compensation under the Longshore Act the exclusive remedy against an employer and insulating the latter from multiple liability. [S.Rep. on S.38, LHWCA Amendments of 1984 (Sept. 20, 1984).]
>
> * * *
>
> It benefits certain employers in the shipbuilding industry by restoring an original purpose of workers' compensation, namely to immunize employers from tort suits as the *quid pro quo* for paying compensation. [S.Rep. on S.38, LHWCA Amendments of 1984 (Sept. 20, 1984).]

[20]*Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 273 (1977); *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 120 (1962).

However, under the Ninth Circuit approach land-based maritime employees engaged in occupations specifically enumerated in the LHWCA on a covered situs could, by the decision of a jury, be excluded from LHWCA coverage.

With the LHWCA Congress intended to eliminate the "uncertainty" of a compensation remedy for injuries to land-based maritime employees on navigable waters.[21] Yet, the Ninth Circuit decision reintroduces uncertainty as to the existence and source of a compensation remedy for injuries of land-based maritime employees on a covered situs who are engaged in specific occupations identified in the LHWCA.[22] Unlike the LHWCA, the Jones Act is not a "no-fault" system; negligence must be established. Thus, many land-based maritime employees, if denominated Jones Act seamen, may end up with no remedy at all for work-related injuries on actual navigable waters if negligence

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[21]*Calbeck, supra*, 370 U.S. at 124, 125.

[22]Notably, the Ninth Circuit relied on *Peterson v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732 (6th Cir. 1986). In *Peterson*, the employee, a machinist on a railroad car ferry, claimed seaman status under the Jones Act. The court applied the "aid in navigation" test and found him to be a seaman under the Jones Act. That is, of course, the same test "jettisoned" by the Court in *Wilander*. More importantly, the Ninth Circuit failed to recognize that *Peterson* is inconsistent with the Court's decisions in *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), and *Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 110 S.Ct. 381 (1989), and the congressional intent behind the LHWCA and its amendments. Indeed, the *Peterson* court failed to distinguish, let alone mention, the Court's decision in *O'Rourke*. That is incredible because Peterson, like O'Rourke, was a railroad employee. In fact, Peterson and Schwalb worked for the same railroad company.

cannot be proven. "Such an anomalous result could not have been intended by Congress."[23]

The Ninth Circuit decision also conflicts with the need of maritime employers and employees alike to quickly and efficiently determine whether a particular employee falls under the Jones Act or the LHWCA. Applying the Ninth Circuit decision, however, even the "most competent counsel may be unable to predict on which side of the line particular employment will fall."[24]

Indeed, continued confusion over whether an employee is covered by the LHWCA or the Jones Act may prompt many employers to simply controvert LHWCA compensation payments on the grounds that the employee is excluded from LHWCA coverage as "a member of a crew of a vessel."[25] Such a result would conflict with one of the primary purposes of the LHWCA: to provide to maritime employees "prompt relief without the expense, uncertainty, and delay that tort actions entail."[26]

Permitting a trial court to reconsider issues that are or should be decided by the LHWCA administrative system[27] effectively defeats the purpose of the LHWCA.[28] "Instead of creating certainty for both employer and employee, permitting a trial court

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[23]*Director, OWCP v. Perini North River Associates (Churchill)*, 459 U.S. 297, 324 (1983).

[24]*Davis, supra*, 317 U.S. at 255.

[25]33 U.S.C. §§ 902(3)(G), 914(d); and *Wilander, supra*, 111 S.Ct. at 807.

[26]*Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 637 (1983).

[27]The LHWCA system is administered by the U.S. Department of Labor. *See Churchill, supra*, 459 U.S. at 303-304.

[28]*Fontenot, supra*, 923 F.2d at 1132.

to redetermine the coverage issue reintroduces uncertainty for both."[29] Allowing a trial court and the U.S. Department of Labor to reach inconsistent determinations on the coverage issue also allows an injured worker to possibly receive both a jury award and a LHWCA remedy, despite Congress' intention that he receive one or the other, but not both.[30]

Moreover, the same can be said of Jones Act lawsuits that was said in 1972 of unseaworthiness lawsuits: "The social costs of these lawsuits, the delays, crowding of court calendars, and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers."[31] The Ninth Circuit approach entails the same social costs, delays, crowding of court calendars, and the need for lawyers services for Jones Act lawsuits that Congress attempted to obviate for unseaworthiness lawsuits with the 1972 Amendments. Such results could occur without any real increase in benefits to LHWCA employees who, perhaps, could end up losing LHWCA benefits.

The approach of the Fifth Circuit as set forth in *Pizzitolo v. Electro-Coal Transfer Co.*[32] and *Fontenot v. AWI, Inc.*[33] avoids such mischief and is consistent with the intent of Congress.[34]

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[29]*Id.; See also Wilander, supra*, 111 S.Ct. at 818.

[30]*Fontenot, supra*, 923 F.2d at 1137.

[31]*Caputo, supra*, 432 U.S. at 263, n.18.

[32]812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988).

[33]*Supra*, 923 F.2d at 1127.

[34]In *Fontenot* and *Pizzitolo*, the Fifth Circuit essentially held that the maritime employees were covered by the LHWCA and therefore ineligible for consideration for Jones Act seaman status. Thus, the statutory employers' motions for summary judgment (continued...)

Under that approach, Gizoni, a land-based ship repairman employed by a statutory employer on a covered situs, is covered exclusively by the LHWCA and is not entitled to proceed to a jury trial to redetermine Jones Act seaman status.

II

THE CONGRESSIONAL INTENT WAS FOR THE LHWCA AND ITS AMENDMENTS TO SUPPLANT THE JONES ACT AS A REMEDY FOR LAND-BASED MARITIME WORKERS INJURED ON A COVERED SITUS.

McDermott International, Inc. v. Wilander[35] makes clear that the LHWCA and Jones Act are "mutually exclusive; a 'seaman' under the Jones Act" is excluded from the LHWCA as a "master or member of a crew of a vessel . . . ." Thus, the Court confirmed that the congressional intent was for the LHWCA to supplant the Jones Act as a remedy for land-based maritime employees covered by the LHWCA and injured in the course of their employment for a statutory employer.[36]

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[34](...continued)
were granted. *Fontenot, supra*, 923 F.2d at 1127; *Pizzitolo, supra*, 812 F.2d at 977.

[35]*Supra*, 111 S.Ct. at 807, 815.

[36]Section 2(4) of the LHWCA, 33 U.S.C. § 902(4), defines a "statutory employer" as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 67, 78-79 (1979). In *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), the Court held that a "statutory employer" (continued...)

The Court has emphasized:

> We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen . . . .[37]

In this case, the Ninth Circuit failed to recognize that it sailed in waters occupied, indeed dominated, by the LHWCA, and expanded a remedy not otherwise available to land-based maritime employees.[38] Furthermore, expanding the Jones Act remedy to land-based maritime employees covered by the LHWCA would work to the detriment of such employees because by allowing Jones Act coverage the Ninth Circuit is in effect depriving such employees of their LHWCA remedy.

Southwest Marine respectfully maintains, in light of the congressional intent, that land-based maritime employees on a covered situs engaged in occupations specifically enumerated in

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[36](...continued)
existed as long as the employer had any employee engaged in "maritime employment" and that it was not necessary that the injured employee be the one that made his employer a "statutory employer." *Id.* at 341; *Churchill*, 459 U.S. at 311, n.21 (1983). It would not appear that there is any dispute that Southwest Marine is a "statutory employer."

[37]*Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317, 327 (1990).

[38]In construction of the legislative history of the LHWCA, the authors are indebted to Kenneth Engerrand for his several works on this topic and specifically, *Seaman's Status Reconsidered*, Kenneth G. Engerrand and Jeffrey Bale, 24 S.Tex. L.J. 431 (1984), and Kenneth G. Engerrand, *Seaman's Status Reconstructed*, 32 S.Tex. L.R. ___ (1991).

LHWCA Section 2(3) are covered exclusively by the LHWCA.[39] It follows that a land-based ship repairman, such as Gizoni, who is employed on a covered situs is not entitled to proceed to a jury trial for reconsideration of Jones Act seaman status.

III

EMPLOYEES IN OCCUPATIONS ENUMERATED IN THE LHWCA ARE LAND-BASED MARITIME EMPLOYEES AS A MATTER OF LAW; THEREFORE, SUCH EMPLOYEES ARE PRECLUDED FROM PURSUING JONES ACT CLAIMS AGAINST THEIR STATUTORY EMPLOYERS.

In *Wilander*, the Court helped to dispel some of the confusion over seaman status and held in part that a "seaman" under the Jones Act and a "master or member of a crew of a vessel" pursuant to the LHWCA should be defined "solely in terms of the employee's connection to a vessel."[40] Thus, a seaman need not aid in the navigation of a vessel. However, in order to qualify as a seaman under the Jones Act, an employee must have "a definite and permanent connection with a vessel and an obligation to forward her enterprise."[41] Moreover, the employee's duties must "contribute to the function of the vessel or to the accomplishment of its mission."[42]

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[39]*See Fontenot, supra*, 923 F.2d at 1127; *Chauvin v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735 (5th Cir. 1989); *Pizzitolo, supra*, 812 F.2d at 977; *Williams v. Weber Management Services, Inc.*, 839 F.2d 1039 (5th Cir. 1987).

[40]*Supra*, 111 S.Ct. at 817.

[41]*Id.*

[42]*Id.*

The Court emphasized in *Wilander* that the Jones Act and LHWCA are a "pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based employees." Further, the Court noted that the subsequently enacted "LHWCA restricted the definition of 'seaman' in the Jones Act only to the extent that 'seaman' . . . [included] land-based employees."[43] Consequently, under *Wilander* a maritime employee can be a Jones Act "seaman" only if that employee is not a land-based employee covered by the LHWCA.

In the present case, the Court has agreed to address whether employees in occupations specifically covered by the LHWCA are nonetheless entitled to proceed to a jury trial to determine their alleged status as Jones Act seamen.[44] Consequently, in reaching that decision, the Court should be guided not only by the history and congressional intent behind the Jones Act, but more importantly by the history and congressional intent behind the subsequently enacted LHWCA and its amendments.

In *Southern Pacific Co. v. Jensen*,[45] the Court declared, prior to the enactment of the LHWCA, that states were constitutionally barred from applying their compensation systems to maritime injuries seaward of the water's edge because that would interfere with the overriding federal policy of a uniform maritime law.

Five months after *Jensen*, Congress unsuccessfully attempted to authorize states to provide workers' compensation to maritime

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[43]*Id.*

[44]This case does not involve the more general "harbor worker" category of "maritime employee", but rather only the specific occupation of "ship repairman." *See Stewart v. Brown and Root, Inc.*, 7 BRBS 356 (1978) (defining the term "harbor worker"), *aff'd sub nom., Brown and Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980).

[45]244 U.S. 205 (1917).

employees injured on navigable waters in order to remove the uncertainty of compensation coverage for workers whose duties were partly on land and partly on navigable waters.[46] That effort was struck down as unconstitutional.[47] In 1922, Congress again attempted to authorize state laws to protect employees injured on navigable waters.[48] That effort was also held invalid.[49]

In 1927, Congress successfully responded to *Jensen* and enacted the LHWCA to provide a remedy to maritime workers other than a "master or member of a crew" injured in the course of their employment on navigable waters.[50] The 1927 LHWCA was a typical workmen's compensation system "compensating an employee for injuries arising out of and in the course of employment."[51] It was designed to fill the void created by the inability of the states to remedy injuries on navigable waters.[52]

As originally enacted, however, the LHWCA provided coverage for injuries occurring "upon the navigable waters of the United States" and permitted compensation awards only "if recovery . . . through workmen's compensation proceedings

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[46]*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

[47]*Id.*

[48]*State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

[49]*Id.*

[50]In addition, since its inception the LHWCA has contained an exclusive liability provision for statutory employers. *See* Act of March 4, 1927, c.509, § 5, 44 Stat. 1426.

[51]*Caputo, supra*, at 258.

[52]*Id.*

[could] not validly be provided by state law."[53] Thus, the 1927 LHWCA had only a "situs" test; it provided coverage only to "those employees of statutory 'employers' injured while working upon navigable waters in the course of their employment."[54]

Congress amended the LHWCA in 1972, partly in response to the Court's decision in *Nacirema Operating Co. v. Johnson*,[55] which held that the LHWCA did not cover longshoremen killed or injured on a pier while engaged in loading a vessel. The 1972 Amendments, among other things, expanded the coverage of the LHWCA shoreward. Congress broadened the definition of "navigable waters of the United States",[56] while amending the definition of persons covered by the LHWCA.[57]

With the expansion of the definition of "navigable waters"[58] Congress was required to affirmatively describe the class of workers it desired to compensate.[59] It thus added the requirement

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[53]*Id.*, at 258, 259.

[54]*Churchill, supra*, 459 U.S. at 312, 315.

[55]396 U.S. 212 (1969).

[56]Section 3(a), prior to the 1972 Amendments, provided in pertinent part that "Compensation shall be payable . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) . . . ." 33 U.S.C. § 903(a).

[57]*Caputo, supra*, 432 U.S. at 263, 264.

[58]33 U.S.C. § 903(a).

[59]The Legislative Reports which summarized the general purposes of the legislation and contained an analysis of the changes proposed for each section made clear that with the 1972 Amendments *Congress did not "intend to cover employees who are*

(continued...)

that the injured worker be "engaged in maritime employment," but the "member of crew" exception remained unchanged.[60]

The LHWCA now provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3) (deemed the "status" test), if the disability or death results from an injury in the course of employment upon "the navigable waters of the United States"[61] (deemed the "situs" test). Hence, a worker must satisfy both a "status" and a "situs" test.[62] The status test requires in part that an employee be engaged in "maritime employment," which is defined as "including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . . ."[63]

Congress thus sought to "extend coverage to protect additional maritime workers,"[64] not to withdraw coverage from those workers injured on actual navigable waters in the course of their employment for a statutory employer who would have been covered by the LHWCA before 1972.[65] Moreover, the legislative

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[59](...continued)
not engaged in loading, unloading, *repairing, or building a vessel, just because they are injured in an area adjoining navigable waters* used for such activity." (Emphasis supplied.) *Churchill, supra*, 459 U.S. at 318.

[60]33 U.S.C. § 902(3).

[61]33 U.S.C. § 903(a).

[62]*Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 416-417 (1985).

[63]33 U.S.C. § 902(3).

[64]S.Rep. No. 1125, 92nd Cong., 2d Sess., 1 (1972).

[65]*Churchill, supra*, 459 U.S. 297.

history behind the 1972 Amendments and the pertinent decisions of the Court to date indicate that Congress intended "to extend landward coverage to those specifically included occupations" in the "explicitly enumerated categories of activities in the § 2(3) definition of 'employee.'"[66]

The Court's decisions in *Northeast Marine Terminal Co., Inc. v. Caputo,*[67] *P.C. Pfeiffer Co., Inc. v. Ford,*[68] and *Director, OWCP v. Perini North River Associates (Churchill)*[69] confirm the conclusion that the LHWCA and its amendments were intended to cover persons, such as Gizoni, who are (1) injured on a maritime situs, (2) employed by a "statutory employer" and (3) engaged in an occupation enumerated in Section 2(3) of the LHWCA.

In *Northeast Marine Terminal Co., Inc. v. Caputo,*[70] the Court was asked to determine whether two maritime workers injured while working on the New York City waterfront were covered by the LHWCA and were within the reach of the 1972 Amendments. Blundo was a checker who checked and recorded cargo in containers as it was loaded and unloaded from vessels, barges or containers.[71] Caputo was a member of a regular longshoring gang, but also worked "casual labor" out of the union hiring hall when not needed for his regular longshoring gang.[72]

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[66]*Id.*, at 318, 319, n. 27.

[67]432 U.S. 249 (1977).

[68]444 U.S. 69 (1979).

[69]459 U.S. 297 (1983).

[70]432 U.S. 249 (1977).

[71]*Caputo, supra,* 432 U.S. at 252, 253.

[72]*Id.*

The Court observed that the relevant terms ("maritime employment," "longshoreman," and "longshoring operations") were not defined by Congress in either the text of the LHWCA or its legislative history.[73] However, the Court emphasized:

> The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation.[74]

The Court then concluded that in view of the liberal and expansive interpretation mandated, plus the congressional desire to accommodate the Act to modern technological change, it was apparent that Blundo was a statutory LHWCA employee. His job was an integral part of the unloading process as altered by the advent of containerization. Therefore, Blundo's job duties were "included in the category of 'longshoring operations.'"[75]

With respect to Caputo, the Court relied on the congressional intent to provide a "uniform compensation system to apply to employees who would otherwise be covered by [the LHWCA] for part of their activity."[76] The Court found that Caputo, who was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck, was also covered by the LHWCA as a longshoreman.[77]

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[73]*Id.* at 266.

[74]*Id.* at 269.

[75]*Id.* at 272.

[76]*Id.* at 274.

[77]*Id.*

Significantly, the Court emphasized:

> The Act focuses primarily on occupations -- longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered for only part of their activity.[78]

Moreover, the Court rejected the "Point of Rest" theory advanced by the petitioners to defeat LHWCA coverage.[79] The Court reasoned that argument was inconsistent with the congressional intent behind the 1972 Amendments because it would restrict LHWCA coverage. The holding and rationale of *Caputo* thus support the conclusion that a land-based ship repairman employed by a statutory employer on navigable waters is covered exclusively by the LHWCA.

Caputo was reaffirmed one year later in *P.C. Pfeiffer Co., Inc. v. Ford*.[80] *Ford* involved two maritime workers engaged in occupations covered by the LHWCA. Ford was injured on a public dock while fastening military vehicles that had been loaded onto railroad flat cars the day before. Bryant was a cotton header

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[78] *Id.*

[79] The "Point of Rest" theory was "claimed [by the petitioners] to be a term of art in the industry that denote[d] the point where the stevedoring operation ends (or, in the case of loading, begins), and the terminal operation function begins (or ends, in the case of loading)." *Id.* at 275-276. The petitioners had claimed that "the maritime employment of longshoremen included only the 'stevedoring activity of the longshore gang'" in the case of unloading of vessels before the "point of rest" and in the case of loading of vessels after the "point of rest." *Id.*

[80] 444 U.S. 69 (1979).

injured while unloading cotton from a dray wagon into a pier warehouse.

The Court held both workers were engaged in maritime employment as longshoremen at the time of their injuries. They were engaged in the intermediate steps of moving cargo between ship and land transportation. Emphasizing that Congress, by virtue of Section 2(3), had adopted an "occupational test" which was distinct from the situs requirement contained in Section 3(a), the Court confirmed that the term "maritime employment" embodied an "occupational rather than a geographic concept."[81]

Key to *Ford* is the Court's conclusion that both Ford and Bryant were "the kind of land-based employees that Congress intended to encompass within the term 'maritime employee.'"[82] Likewise, Gizoni is precisely the kind of land-based maritime employee that Congress intended to encompass within the term "ship repairman."[83]

Finally, in *Director, OWCP v. Perini North River Associates (Churchill)*,[84] the Court held that a marine construction worker injured while on the deck of a cargo barge was engaged in

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[81] *Id.* at 80.

[82] *Id.* at 82.

[83] *See Ford, supra*, 444 U.S. at 80-81, wherein the Court noted that prior to the 1972 Amendments "the Senate Subcommittee on Labor heard testimony [from one witness] that 30% - 35% of ship repair work . . . [was] . . . done on land[,]" and "that the same witness when asked *if his company would favor extending federal benefits to all ship repairmen instead of continuing the pre-1972 practice of limiting federal compensation to ship repairmen who worked on the water*[,]" stated that "we would interpose no objection. . . ." (Emphasis supplied.)

[84] 459 U.S. 297 (1983).

"maritime employment" pursuant to Section 2(3) and covered by the LHWCA. Churchill was in charge of all work performed on cargo and supply barges, which included loading and unloading caissons and other materials for the construction of a foundation for a sewage disposal plant on the Hudson River.[85] The Court noted that in *Caputo* and *Ford* it had recognized that the status test is an occupational requirement.[86]

Thus, the legislative history behind the 1972 Amendments and the Court's decisions in *Caputo*, *Ford*, and *Churchill* establish that the Section 2(3) focus on occupations evinces a congressional intent to sweep employees in occupations enumerated in the LHWCA within the exclusive coverage of the LHWCA.[87] Gizoni

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[85]The Court's decision in *Churchill* is arguably inconsistent with *Wilander*. Under the *Wilander* test, Churchill could conceivably be entitled to proceed to a jury trial to determine his status as a Jones Act seaman because his duties, at least arguably, contributed to the purpose or function of a vessel (the cargo or supply barges), and he, again arguably, had a more or less permanent connection to a vessel in navigation. Southwest Marine urges the Court that the best means of reconciling *Churchill* with *Wilander* is for the Court to adopt the approach of the Fifth Circuit based on the thorough and well crafted decisions of Judge Wisdom in *Fontenot, supra*, 923 F.2d at 1127, and Judge Davis in *Pizzitolo, supra*, 812 F.2d at 977.

[86]*Churchill, supra*, 459 U.S. at 323, n. 32.

[87]Moreover, in *Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 110 S.Ct. 381 (1989), three justices joined in the majority opinion, but concurred specially and concluded that so long as an employee "'spends some of his time in indisputably longshoring operations' then the employee is covered by the LHWCA even if he was not so engaged at the specific time of his injury." *See Fontenot, supra*, 923 F.2d at 1129. The same reasoning applies no less to an employee who spends part of his

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is a land-based ship repairman employed by a statutory employer on navigable waters. As such, he is covered by the LHWCA and is not entitled to proceed to a Jones Act jury trial for a redetermination of seaman status.[88]

IV

EXPANSIVE COVERAGE UNDER THE LHWCA IS CONSISTENT WITH THE CONGRESSIONAL INTENT BEHIND THE LHWCA AND ITS AMENDMENTS TO PROVIDE A UNIFORM COMPENSATION SYSTEM FOR LAND-BASED MARITIME EMPLOYEES.

Coverage by the LHWCA has been the source of confusion and uncertainty since it was enacted in 1927. Indeed, employees and employers alike have been thrust on the "horns of [a] jurisdictional dilemma. . . ."[89]

Nevertheless, when addressing issues of jurisdiction under the LHWCA, the Court has been guided by the purposes behind the Act and its amendments. The Court has repeatedly emphasized that the LHWCA was "designed to ensure that a compensation remedy existed for all injuries sustained by employees [of statutory employers] on navigable waters, and to avoid uncertainty . . . as to the source of that remedy."[90] Moreover, the Senate and the

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[87](...continued)
time in indisputably ship repair, even if he was not so engaged at the time of his injury. However, in the present case, Gizoni was also engaged in ship repair at the time of his injury.

[88]*See Fontenot, supra*, 923 F.2d at 1127; *Williams, supra*, 839 F.2d at 1039; *Pizzitolo, supra*, 812 F.2d at 977.

[89]*Churchill, supra*, 459 U.S. at 309.

[90]*Id.* at 310; *Calbeck, supra*, 370 U.S. at 124.

House of Representatives committee reports before enactment of the LHWCA firmly establish Congress' intent to achieve uniformity in this area as early as 1921.[91]

Those principles apply no less to the present case. The Ninth Circuit approach, however, conflicts with those principles. Indeed, under the Ninth Circuit approach a land-based maritime employee engaged in an occupation covered by the LHWCA while employed on a covered situs could be denied LHWCA coverage based on a Jones Act jury finding of seaman status.

Moreover, under prior Ninth Circuit case law, almost any evidence would be sufficient for a Jones Act claim to get to a

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[91] Clearly the whole employment of a longshoreman must be covered by a single act if he is to receive satisfactory protection. He must not be left in doubt as to which jurisdiction he must apply for his compensation. He must not be forced to apply to one jurisdiction in the event that an accident happens on land, to another in the event that an accident happens on the ship, with totally different remedies in each case, and be in doubt as to where to apply if he is injured while in the "twilight zone." The employer, furthermore, should not be compelled to divide his compensation insurance risk between two separate statutes, with necessarily varying terms. [S.Rep. No. 94, 67th Cong., 1st Sess., 5 (1921).]

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The situation as it exists today is exceedingly confused and disconcerting with reference to remedies depending on the peculiar character of the longshoreman's employment at the moment of injury. [H.R. Rep. No. 639, 67th Cong., 2d Sess., 58 (1921).]

jury.[92] That result is simply inconsistent with the congressional intent for a uniform compensation system to apply to land-based maritime employees injured on a covered situs.

Further, the Court has long held that the later enacted LHWCA "must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results."[93] It would be incongruous for a land-based ship repairman injured on navigable waters while employed by a statutory employer to be excluded from LHWCA coverage. It would also be anomalous for such an employee to be deprived of a remedy, if deemed a Jones Act seaman and there was a finding of no employer negligence.

Nevertheless, the Court's decisions in *Calbeck,*[94] *Caputo,*[95] and *Ford*[96] establish that the LHWCA and its amendments were intended by Congress to provide a uniform compensation system to land-based maritime employees on a covered situs and that the LHWCA reaches at least those persons, such as Gizoni, engaged in occupations specifically enumerated in Section 2(3).

In *Calbeck,*[97] the Court of Appeal had denied LHWCA coverage to two shipyard workers injured while engaged in the construction of a vessel afloat on navigable waters. The Court reversed and held that LHWCA coverage did not depend on

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[92] *See Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983).

[93] *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Caputo, supra*, 432 U.S. at 268.

[94] *Supra*, 370 U.S. 114 (1962).

[95] *Supra*, 432 U.S. 249 (1977).

[96] *Supra*, 444 U.S. 69 (1979).

[97] *Supra*, 370 U.S. 114 (1962).

whether state compensation laws apply or might constitutionally apply. The Court noted that in 1927 Congress was confronted with the twin problems of the lack of an available compensation remedy for many maritime injuries (those seaward of the *Jensen* line), and the uncertainty created by judicial decision in the administration of compensation.

However, one of the chief purposes of the LHWCA was to dispel that confusion.[98] Congress had thus "turned to a uniform federal compensation law as an instrument for dealing" with both problems.[99] The Court therefore held that both shipyard workers were covered, emphasizing that the LHWCA was "designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source . . . of that remedy."[100]

In the same vein, in *Caputo*[101] the Court emphasized that the LHWCA applied to those persons on a covered situs who are in occupations specifically covered by the LHWCA or who indisputably spend at least part of their time in occupations specifically covered by the LHWCA. Blundo's duties were an integral part of the "longshoring operations." And Caputo's duties brought him within the reach of the 1972 Amendments as a "longshoreman." In the present case, Gizoni's duties as a land-based ship repairman for a shore-based ship repair yard on a covered situs also establish that Gizoni is covered by the LHWCA.

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[98]*Id.* at 126.

[99]*Id.* at 120.

[100]*Id.* at 124.

[101]*Supra*, 432 U.S. 249 (1977).

In *Ford*,[102] the Court emphasized that with the 1972 Amendments Congress intended that a worker's eligibility for LHWCA benefits not depend on whether the worker was injured while walking down the gangway or while taking his first step onto land. Congress also did not intend that a worker's eligibility for LHWCA benefits depend on whether a land-based maritime worker was injured while working on shore or while working on a floating platform, or indeed even a barge, in the course of ship repair activity. It was for that reason that Congress adopted an "occupational test" for employees injured on a covered situs. It is for the same reason that Gizoni is covered by the LHWCA.

The Ninth Circuit approach thus conflicts with the congressional goal of "a single, uniform standard of coverage" under the LHWCA because any "worker's coverage would depend on the job assignment policies of his employer."[103] In contrast, a definition of "maritime employment" that embraces any worker in an occupation specifically enumerated in the LHWCA and injured on a covered situs will enable both workers and employers to predict with reasonable assurance who is protected by the LHWCA.[104]

The approach of the Ninth Circuit also requires "employees to determine with certainty before bringing their actions that factual question over which courts regularly divide . . . ."[105] "As penalty for error, the injured employee may . . . suffer serious

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[102]*Ford, supra*, 444 U.S. at 75.

[103]*Ford, supra*, 444 U.S. at 84.

[104]*Id.* at 85; *see also General Dynamics Corp. v. Sacchetti*, 681 F.2d 37 (1st Cir. 1982); *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070 (4th Cir. 1980).

[105]*Davis, supra*, 317 U.S. at 254.

financial loss through the delay and expense of litigation . . . ."[106]

The Court acknowledged almost 50 years ago that

> [s]uch a result defeats the purpose of the . . . [LHWCA], . . . which seeks to give . . . the justice involved in the modern principle of compensation" . . . [and] . . . sure and certain relief for workmen. [Footnote omitted.][107]

It was precisely that uncertainty that the LHWCA and its amendments were designed to dispel.[108] Therefore, the decision of the Ninth Circuit, holding that Gizoni (who is covered by the LHWCA) is entitled to a jury trial on his Jones Act "seaman" claim, must be reversed. Gizoni was engaged in an occupation expressly enumerated in the LHWCA while employed for a statutory employer on a covered situs. Thus, regardless of what

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[106]*Id.*

[107]*Id.*

[108]*See* S.Rep. No. 1125, 92nd Cong., 2d Sess., 2 (1972). The goal of uniform coverage was also of concern during the Congressional discussions regarding the 1984 Amendments to the Act:

> The Longshore Act has not proved to be the model and uniform compensation program it was represented to be when the 1972 amendments were passed, but when the Senate passed the conference report to S. 38, I strongly believe that we will be close to the goal of providing fair and equitable compensation to longshoremen and harbor workers who are injured while working over the navigable waters of the United States. [H.R. Rep. No. 1441, 92nd Cong., 2d Sess., 10-11 (1972).]

a jury may decide, Gizoni is ineligible for consideration as a Jones Act seaman.

V

MARITIME EMPLOYEES IN OCCUPATIONS COVERED BY THE LHWCA ARE PRECLUDED FROM PURSUING JONES ACT CLAIMS IN THE SAME FASHION THAT SUCH EMPLOYEES ARE PRECLUDED FROM PURSUING FELA CLAIMS AGAINST THEIR STATUTORY EMPLOYERS.

The Jones Act established a uniform system of seaman tort law parallel to that available to employees of interstate railway carriers under the Federal Employers' Liability Act ("FELA").[109] In demarcating coverage between the FELA and the LHWCA, the Court has adopted the same occupational test urged here by Southwest Marine. That is the same test the Court applied in *Northeast Marine Terminal Co., Inc. v. Caputo*[110] and *P.C. Pfeiffer Co., Inc. v. Ford.*[111] Uniformity and consistency mandate that the same occupational test be applied to demarcate the line between Jones Act and LHWCA coverage.

The Court first employed the occupational test in *Pennsylvania Railroad Co. v. O'Rourke,*[112] which involved an action brought under the FELA before the 1972 Amendments to the LHWCA. In *O'Rourke*, the Court held that a railroad brakeman's FELA action for injuries sustained while releasing a defective hand brake on a freight car aboard a car float in navigable waters was barred.

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[109]*Miles, supra,* 111 S.Ct. at 324.

[110]*Supra,* 432 U.S. 249 (1977).

[111]*Supra,* 444 U.S. 69 (1979).

[112]*Supra,* 344 U.S. 334 (1953).

The Court concluded that the brakeman's exclusive remedy was provided by the LHWCA because he was employed by a maritime employer under the LHWCA, his injury occurred on navigable waters, and he was on navigable waters in furtherance of his employer's business.[113] The same reasoning applies no less to Gizoni.

The Court applied the same approach in *Chesapeake and Ohio Railway Co. v. Schwalb.*[114] In *Schwalb*, a group of railroad employees injured while working on a pier from which coal was being loaded onto ships brought suit under the FELA. They were engaged in machine repair, housekeeping and janitorial duties. The Court, relying on *Caputo*, *Ford*, and *Herb's Welding v. Gray*[115] held that because those employees were performing work essential to the ship loading process, the LHWCA (not the FELA) was their exclusive remedy.

In *Schwalb*, the Court relied on *Herb's Welding v. Gray*,[116] which was not a FELA case. In *Gray*, the Court employed the occupational test to deny LHWCA coverage to a welder working on an offshore oil rig. The Court emphasized that Gray's work was "far removed from traditional LHWCA activities" and that the LHWCA was not meant to cover those employees not engaged in loading, unloading, repairing or building of a vessel merely because they are injured in an area adjoining navigable waters. It follows that the LHWCA was meant to cover those employees, such as Gizoni, who are engaged in loading, unloading, building or repairing a vessel when they are injured on a covered situs.

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[113] *Id.* at 342.

[114] 493 U.S. 40 (1989).

[115] *Supra*, 470 U.S. at 414.

[116] *Id.*

The rationale of *O'Rourke*, *Gray* and *Schwalb* applies to the present case. Such maritime employees are precluded from bringing Jones Act claims against their LHWCA employers. Indeed, the occupational test is consistent with the intent of Congress that the Jones Act and LHWCA be mutually exclusive. Therefore, the decision of the Ninth Circuit, which is in conflict with *O'Rourke*, *Gray* and *Schwalb*, should be reversed.

VI

MARITIME EMPLOYEES IN OCCUPATIONS COVERED BY THE LHWCA ARE PRECLUDED FROM PURSUING JONES ACT CLAIMS IN THE SAME FASHION THAT SUCH EMPLOYEES ARE PRECLUDED FROM PURSUING LHWCA SECTION 5(b) CLAIMS AGAINST THEIR STATUTORY EMPLOYERS AND UNSEAWORTHINESS CLAIMS AGAINST THIRD PERSONS.

The LHWCA contains an exclusive liability provision.[117] Section 5(a) provides that because the LHWCA employer is required to pay compensation and medical benefits regardless of fault to an injured employee, the employee is barred from bringing a tort action against the employer.[118]

Thus, Section 5(a) is a "classic *quid pro quo*, one commonly found in workers' compensation legislation."[119] The injured employee is assured of receiving compensation promptly,

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[117] 33 U.S.C. § 905(a).

[118] *See Bush*, *supra*, 927 F.2d at 445.

[119] *Cf. Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983) (in which the Court described a similar exclusive liability provision contained in the Federal Employees Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq.*)

efficiently, and in an amount sufficient to cover his medical expenses regardless of fault. In return, the LHWCA remedies are the exclusive means of recovery. The right to bring a lawsuit that might ultimately have yielded more in damages if it could be proven the employer was negligent has been extinguished by the LHWCA.[120]

In *Morrison-Knudsen Construction Co. v. Director, OWCP,*[121] the Court emphasized that:

> [T]he [LHWCA] is not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other. Employers relinquished their defense to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail.

The Ninth Circuit, however, would allow employees engaged in occupations specifically covered by the LHWCA (such as Gizoni) to obtain the benefits of the LHWCA and then circumvent the exclusive liability provisions of the LHWCA. The LHWCA would constitute a mere stepping stone to a possible jury award. Gizoni would thus enjoy the security of the "no-fault" LHWCA remedy while also attempting to obtain a Jones Act remedy not otherwise available to other land-based LHWCA workers.[122]

Nevertheless, employees covered by the LHWCA have attempted to circumvent its exclusive liability provisions since its

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[120]*See Bush, supra,* 927 F.2d at 445.

[121]461 U.S. 624, 636 (1983).

[122]Bull, *Seaman Status Applied: A Practical Guide To Status Determination,* 1 U.S.F. Maritime Law Journal 43, 115 (1989).

enactment. However, Congress has repeatedly indicated that the LHWCA is the exclusive remedy of LHWCA employees against their statutory employers for injuries on a covered situs.

The first occasion where LHWCA employees were able to circumvent Section 5(a) arose between 1946 and 1972. Beginning in 1946, an injured longshoreman could obtain the benefits of the LHWCA and also sue the owner of the vessel on which he was working and obtain damages for his injuries regardless of fault, based on the doctrine of seaworthiness. That was due to a number of decisions of the Court starting with *Seas Shipping Co. v. Sieracki.*[123] In addition, based on the Court's ruling in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,*[124] shipping companies succeeded in recovering from the stevedore-employers the damages for which the shipping companies were held liable to injured longshoremen.[125]

The end result of the Court's decisions was that despite Section 5(a)'s exclusive liability provision for the LHWCA employer, the stevedore-employer was indirectly liable for damages to an injured longshoreman, its employee, who used the technique of suing the vessel under the seaworthiness doctrine.[126] Prior to the 1972 Amendments, Congress noted that the social costs of those lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services seldom resulted in a real increase in actual benefits for injured workers.[127] The same can

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[123]328 U.S. 85 (1946). *See Caputo, supra,* 432 U.S. at 262, 263, n.18.

[124]350 U.S. 124 (1956).

[125]*Caputo, supra,* 432 U.S. at 262, 263, n.18.

[126]*Id.*

[127]*Id.*

be said of Jones Act lawsuits brought by LHWCA employees against their statutory employers.

Due in part to the intolerable situation whereby LHWCA employees had circumvented the exclusive liability provisions of the LHWCA, Congress enacted the 1972 Amendments. Among other things, those amendments eliminated the longshoremen's strict liability seaworthiness remedy against shipowners and also eliminated shipowners' claims for indemnification against stevedores.[128]

With the 1972 Amendments Congress intended that land-based maritime workers were to be treated as other land-based workers, that only "seamen" were to be treated differently:

> [t]he seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. *The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel . . . [t]he purpose of the amendment is* to place an employee injured aboard a vessel in the same position he would be if injured in non-maritime employment ashore . . . and *not endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called . . . .* [129] [Emphasis Supplied.]

Thus, allowing a land-based shipyard worker such as Gizoni to proceed with a Jones Act claim against his shipyard employer

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[128]*Caputo, supra,* 432 U.S. at 263.

[129]S.Rep. No. 1125, 92nd Cong., 2d Sess., 9-10 (1972); H.R. Rep. No. 1441, 92nd Cong., 2d Sess., 6 (1972).

is simply inconsistent with the rationale for precluding unseaworthiness claims by such land-based maritime workers. Indeed, the Ninth Circuit decision would also allow Gizoni to proceed with his unseaworthiness claim, which clearly conflicts with the 1972 LHWCA Amendments.

Nonetheless, for a short period after the 1972 Amendments, LHWCA employees were still able to circumvent the exclusive liability provisions of the LHWCA. Congress again confirmed with the 1984 Amendments that the LHWCA was to be the statutory employer's exclusive liability to its LHWCA employees for injuries on a covered situs.

Although Section 5(a) bars a shipyard worker from bringing an action against his employer, Section 5(b)[130] expressly allows the injured worker to bring a negligence action against the owner of a vessel upon which he has sustained his injuries.[131] Generally, there is no conflict between Section 5(a) and Section 5(b) because the injured worker's employer is not usually the same entity that owns the vessel.[132]

In some cases, however, shipyard workers are employed directly by vessel owners. Faced with this conflict, the Court held in 1983 in *Jones & Laughlin Steel Corp. v. Pfeifer,*[133] that where the vessel owner operated in a "dual capacity" as both employer and vessel owner, there was an exception to Section 5(a)'s

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[130]33 U.S.C. § 905(b). The right to sue the vessel owner for negligence is based on the vessel owner's duty, under federal maritime law, to maintain the ship in a reasonably safe condition. *Scandia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 163, n.10 (1981).

[131]*Bush, supra,* 927 F.2d at 445.

[132]*Id.*

[133]462 U.S. 523, 528 (1983).

exclusive liability. Thus, the injured worker's Section 5(b) right to tort damages for negligence against the vessel owner prevailed over Section 5(a) even where the vessel owner was also the employer.[134]

However, that loophole didn't survive long. Sixteen months after the Court's decision in *Jones & Laughlin*, Congress amended Section 5(b)[135] to expressly bar suits directly or indirectly by injured shipyard workers against "dual capacity" shipyards.[136] Consequently, Congress again indicated in no uncertain terms that the LHWCA is to be the statutory employer's exclusive liability for injuries of its LHWCA employees on a covered situs.[137]

Section 5(a) clearly provides that the LHWCA is the statutory employer's exclusive liability for work-related injuries to its LHWCA employees on a covered situs. And, Section 5(b) expressly bars negligence lawsuits of LHWCA employees against their statutory employers. The congressional intent behind the 1984 Amendments confirms that Sections 5(a) and 5(b) should also bar other lawsuits, such as Jones Act claims which are also premised on negligence, by LHWCA employees against their statutory employers.

Gizoni is simply attempting to circumvent the exclusive liability provisions of the LHWCA. The Ninth Circuit's mechanical application of prior Supreme Court precedent, without considering the congressional intent expressed by the LHWCA and its amendments, sanctions the mischief Congress has repeatedly sought to avoid.

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[134]*Id.* at 532.

[135]33 U.S.C. § 905(b).

[136]*See Bush, supra*, 927 F.2d at 445.

[137]See Footnote 19.

Such an approach is inconsistent with the congressional intent behind the 1972 and 1984 Amendments to the LHWCA.[138] That congressional intent establishes that the LHWCA, which is liberally construed to provide generous benefits to LHWCA employees, is the statutory employer's exclusive liability for injuries of its LHWCA employees on a covered situs.

> [L]egislation sends . . . signals to which an admiralty court must attend. 'The Legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.' [Citation omitted.] Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits.[139]

The Ninth Circuit has gone beyond the limits prescribed by Congress by allowing land-based maritime employees in occupations specifically enumerated in the LHWCA to pursue Jones Act claims against their statutory employers. Therefore, Southwest Marine urges the Court to hold, consistent with the congressional intent, that a land-based maritime employee engaged in an occupation enumerated in the LHWCA and injured on a covered situs is ineligible to have his "seaman" status determined by a jury in a Jones Act proceeding.

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[138]See Footnotes 19 and 129.

[139]*Miles, supra*, 111 S.Ct. at 321.

VII

WHERE AN EMPLOYEE IS ARGUABLY COVERED BY THE LHWCA, BUT THAT EMPLOYEE'S STATUS CANNOT BE DETERMINED BY THE COURT AS A MATTER OF LAW, THE COURT SHOULD DEFER TO THE EXPERTISE OF THE LHWCA ADMINISTRATIVE AGENCY CHARGED BY CONGRESS WITH THE AUTHORITY FOR DETERMINING LHWCA COVERAGE AND "MEMBER OF A CREW" STATUS.

The District Court held as a matter of law that Gizoni was not a Jones Act seaman. Implicitly, it found that applying the legal standards to the facts, Gizoni had not even presented an arguable case for seaman status, *i.e.*, that based on the facts, reasonable persons applying the proper legal standards could not reach any other conclusion. Thus, the District Court did ". . . not abdicate its duty to determine if there (was) a reasonable basis to support (a) jury's conclusion." Rather, it found as a matter of law there was nothing for a jury to decide. Other cases, however, may not be so clear-cut.

In *Wilander*, the Court observed that "(I)t is odd but true that the key requirement for Jones Act coverage now appears in another statute,"[140] *i.e.*, the Longshore Act in which Congress extended LHWCA coverage to all maritime workers on a covered situs other than "a master or member of a crew" (Jones Act "seaman"). Congress also delegated the authority to decide who is a "member of a crew" (and conversely a Jones Act "seaman") to the expertise of the administrative agency it established by the LHWCA. Thus, it appears even odder that Jones Act seaman status may also be decided by a jury.

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[140]*Supra*, 111 S.Ct. at 813.

In *Wilander*, the Court noted it had held in *South Chicago Coal & Dock Co. v. Bassett*[141] that Congress had given the LHWCA administrative officer the authority to determine who is a "member of a crew" under the LHWCA.[142] "As odd" as it may seem, Congress thus gave the same LHWCA administrative officer the authority to decide who is a "seaman" under the Jones Act because the LHWCA phrase "master or member of a crew" is merely a congressional refinement of the Jones Act term "seaman."[143]

Yet, the decision of the Ninth Circuit permits a Jones Act jury to usurp the authority and expertise of the administrative agency established by Congress to determine such questions.[144] In enacting the LHWCA, Congress sought uniformity, consistency and exclusivity, and it did not intend that employees could obtain conflicting determinations regarding "member of a crew" or "seaman" status in different forums.[145] Moreover, Congress never intended that an employee could either pick and choose which statutory scheme he prefers or recover under both statutes. But, a Jones Act jury trial on the issue of "seaman" status,

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[141]309 U.S. 251 (1940).

[142]*Wilander, supra*, 111 S.Ct. at 818.

[143]*Id.* at 817.

[144]That the LHWCA administrative agency has not made a determination of Gizoni's status under the LHWCA or Jones Act is immaterial, reflecting only that Gizoni elected to bypass the LHWCA administrative agency and proceed directly with his Jones Act suit in district court.

[145]*See Fontenot, supra*, 923 F.2d at 1132-33.

although characterized as a mixed question of law and fact,[146] clearly leads to such mischief.[147]

In *Wilander*, the Court was "not asked" to reconsider the rule that a Jones Act plaintiff was entitled to a jury trial on the issue of "seaman" status.[148] Here, it is. In order to maintain the mutual exclusivity of the two Acts, it is necessary in a Jones Act case, where plaintiff performs work enumerated under the LHWCA on a covered situs but asserts seaman status, for the court to initially determine as a matter of law whether LHWCA coverage exists. If it does, a plaintiff is not entitled to recover under the Jones Act -- nor to a jury trial to determine "seaman" status.[149]

Congress was cognizant of the Jones Act and its shortcomings when it subsequently enacted the LHWCA and its amendments. The LHWCA and its amendments are the last and clearest expressions of congressional intent that Jones Act "seaman" status should be determined by the expertise of the administrative agency Congress created through the LHWCA. In particular, Congress established and authorized the LHWCA administrative agency to determine Longshore coverage (and thus Jones Act coverage) by delegating the authority to administratively decide the mixed questions of fact and law of who is or is not a "master or member of a crew," and thus who is or is not a Jones Act "seaman."[150]

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[146]*Wilander, supra,* 111 S.Ct. at 818.

[147]*Fontenot, supra,* 923 F.2d at 1132.

[148]*Wilander, supra,* 111 S.Ct. at 818.

[149]*Pizzitolo, supra,* 812 F.2d at 982-983; *Williams, supra,* 839 F.2d at 1041; *Fontenot, supra,* 923 F.2d at 1133; *Cf. O'Rourke, supra,* 344 U.S. at 304-306; and *Schwalb, supra,* 493 U.S. at 40.

[150]*See Fontenot, supra,* 923 F.2d at 1132. "While we recognize that there are differences between the fact-finding (continued...)

In order to achieve consistency and preserve mutual exclusivity, it intended to remove the issue of seaman status from a Jones Act jury.

A decision by an LHWCA administrative officer on the mixed question of fact and law is binding on a Jones Act claim if there is sufficient evidence to support it.[151] That is, a final LHWCA decision that an employee is covered by the LHWCA, and therefore is not a "master or member of a crew" or a Jones Act "seaman," precludes a Jones Act suit.[152] Thus, there can be no "seaman" status issue for a jury to decide.[153]

But what if, as in this case, the employer has provided LHWCA benefits without a prior LHWCA administrative determination of LHWCA coverage or "member of a crew" status, and the employee then files a Jones Act suit? Again, as the Court recognized in *Wilander*, Congress intended that Jones Act coverage be determined, not by a jury, but by the LHWCA. That includes the special expertise of the administrative agency to which Congress entrusted the determination of who is a "master or

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[150](...continued)
process in the administrative forum and in the judicial forum, we doubt that the differences are sufficient to deprive an injured employee of a fair opportunity to present the coverage issue before the Department."

[151]*Wilander, supra,* 111 S.Ct. at 818.

[152]*Id.*

[153]*Id.*

member of a crew" and thus "seaman" status.[154] And, if LHWCA coverage exists, Jones Act coverage does not.

Thus, where there has not been a LHWCA determination in a Jones Act case in which the plaintiff is arguably covered by the LHWCA, the court should either determine LHWCA coverage as a matter of law (as the District Court did here) or stay the Jones Act proceeding until the plaintiff has obtained a final LHWCA agency determination that he is a "master or member of a crew," *i.e.*, a Jones Act "seaman."[155]

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[154]Indeed, Southwest Marine urges the Court to apply a test similar to that adopted by the Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), regarding the primary jurisdiction of the NLRB. In *Garmon*, the Court held the National Labor Relations Act ("NLRA") preempts the jurisdiction of courts over conduct which is "arguably" covered by the NLRA. Where there is preemption, the courts simply lack the power to adjudicate claims. The same approach should apply for claims arguably covered by the LHWCA. *See also Intern. Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 389 (1986), quoting from *Garmon*.

[155]LHWCA Section 5(a) is similar to the exclusive remedy provision of 5 U.S.C. § 8116(c) of the Federal Employees Compensation Act ("FECA"). In *Reep v. United States*, 557 F.2d 204 (9th Cir. 1977), the Ninth Circuit addressed the issue of whether a federal employee's claim brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, against the United States, in effect the employer, was barred by FECA. The Ninth Circuit held that an injured federal employee may not bring an action under the FTCA where there is a "substantial question of coverage" under FECA. The employee must first pursue his FECA remedies unless the injuries are clearly not covered under FECA. That same reasoning should apply to Jones Act claims where there is a substantial question of LHWCA coverage.

In sum, Congress specifically entrusted the LHWCA administrative agency with the authority to determine the mixed questions of fact and law involved in determining whether an employee is covered by the LHWCA or by the Jones Act as a "master or member of a crew." Permitting a Jones Act jury to make that determination perpetuates the mischief Congress sought to end. Therefore, if a Jones Act court cannot itself render a determination of LHWCA coverage as a matter of law through summary judgment, it should defer or stay the Jones Act proceeding until there has been a final coverage decision by the LHWCA administrative agency.[156]

VIII

THE DISTRICT COURT APPLIED THE PROPER LEGAL STANDARDS TO THE UNDISPUTED FACTS AND FOUND THAT GIZONI WAS NOT A JONES ACT SEAMAN.

The District Court found that: the floating platforms were not vessels in navigation;[157] Gizoni was not permanently connected

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[156]Such a procedure is consistent with the "no fault" and "agency expertise" concepts implicit in the LHWCA. It is also consistent with congressional intent to achieve consistency and mutual exclusivity while avoiding duplicate coverage and the exploitation of both financial and judicial resources.

[157]The District Court specifically found that the structure and purpose of the floats was to facilitate repair of other vessels. They did not have raked bows, lifeboats, lifesaving equipment, billage pumps, crew quarters or registration required for navigation and were essentially nothing more than platforms or docks upon which riggers stood. J.A. III.

to a vessel;[158] and he was not aboard any floating structure in connection with a vessels's mission. Rather, Gizoni was on the floating platforms to perform ship repair. Therefore, it found as a matter of law that Gizoni was a harbor worker covered by the LHWCA (not a Jones Act seaman).[159] As such, Gizoni was precluded by the exclusive remedy provisions of the LHWCA from bringing a Jones Act suit and from having his alleged Jones Act "seaman" status determined by a jury.[160]

The Ninth Circuit found that Gizoni's "seaman" status, and thus his coverage or noncoverage by the LHWCA, must be submitted to a Jones Act jury.[161] The Ninth Circuit thus failed to recognize (1) that Congress never intended LHWCA coverage to be determined by the decision of a Jones Act jury and (2) that traditional summary judgment is available to determine "seaman" status in an appropriate Jones Act case.[162]

Moreover, this Court recently reemphasized in *Wilander* that where the underlying facts are established, as here, they must be analyzed by the court to determine whether or not, as a matter of law, they meet the proper statutory standard. In other words, where the trial court finds on the facts that a jury could, as a

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[158]*Id.* The District Court specifically concluded that the floating platforms or docks to which Gizoni claimed assignment were not "vessels in navigation" and that Gizoni was only aboard any such platforms to perform his work as a ship repairman. J.A. I.

[159]*Id.*

[160]*Cf. Wilander, supra*, 111 S.Ct. at 818.

[161]J.A. II.

[162]*Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

matter of law, reach only one conclusion, summary judgment or a directed verdict is mandated.[163] This is such a case.

The cases following the Fifth Circuit's decision in *Robison* show that Gizoni is unable to establish facts upon which a Jones Act jury could reasonably find "seaman" status.[164] The Fifth Circuit has found as a matter of law that a shipyard rigger such as Gizoni fails to qualify for seaman status under the analysis set forth in either *Pizzitolo* or *Robison*.[165] Moreover, this Court has indicated that "the key to (Jones Act) seaman status is an employment-related connection to a vessel in navigation. A necessary element of this connection is that the seaman perform the work of the vessel. [Citation omitted.]"[166] Gizoni presented no such facts.

Gizoni was not performing the work of a vessel and he did not have the required employment-related connection to a vessel in navigation. Thus, a Jones Act jury finding that Gizoni is a "seaman", and therefore not covered by the LHWCA, would be inconsistent with the legal standards that were properly applied by the District Court.[167] As the Court suggested in *Wilander*, the District Court merely applied the applicable legal standard to the admitted facts when it found Gizoni was not a Jones Act "seaman."[168]

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[163]*Wilander, supra*, 111 S.Ct. at 818.

[164]*Fazio v. Lykes Bros. S.S. Co., Inc.*, 567 F.2d 301, 303 (5th Cir. 1978); *Thibodeaux v. J. Ray McDermott & Co.*, 276 F.2d 42, 46 (5th Cir. 1960).

[165]*Bouvier v. Krenz*, 702 F.2d 89 (5th Cir. 1983).

[166]*Wilander, supra*, 111 S.Ct. at 817.

[167]*Id.*

[168]*Id.* at 818.

Based on the admitted facts presented in this case, a jury could not reasonably find under the proper legal standards that Gizoni was a "member of a crew". Thus, summary judgment was appropriate and Gizoni is not entitled to a jury determination of his alleged seaman status. The decision of the Ninth Circuit should be reversed.

IX

CONCLUSION

Gizoni, a rigger and rigging foreman for Southwest Marine, a ship repair yard, falls squarely within the definition of "ship repairman," an occupation specifically covered by the LHWCA. In addition, Gizoni was injured on a covered situs. As such, he is covered by the LHWCA. As an employee covered by the LHWCA he is not entitled to proceed to a jury trial on the issue of alleged seaman status. A holding to the contrary would violate congressional intent behind the LHWCA and its amendments and place an inappropriate burden on employees and employers that Congress intended to protect from such burdens by the LHWCA.

In the instant case, Gizoni fails to qualify for jury consideration under any test for seaman status because of lack of a vessel in navigation, and lack of a sufficient connection to any vessel. Simply put, Gizoni aided in ship repair work, and not a ship's work or mission. Thus, the District Court properly granted summary judgment. If any doubt existed as to Gizoni's status as a seaman, the Ninth Circuit should have required deferral to the

LHWCA administrative agency in order to avoid inconsistent results, uncertainty, and the burdens sought to be avoided by the LHWCA. The Ninth Circuit decision should be reversed.

Respectfully submitted,

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